

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of ROBERT CHESEBOROUGH,
Deceased.

LILLY CHESEBOROUGH, as Trustee,
etc.

Petitioner and Respondent,

v.

JAMES J. JOSEPH, at Trustee, etc.

Objector and Appellant.

G039425

(Super. Ct. No. A225374)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Marjorie
Laird Carter, Judge. Affirmed.

Jay Oberholtzer for Objector and Appellant.

Albertson Davidson and Keith A. Davidson and Stewart R. Albertson for
Petitioner and Respondent.

*

*

*

James J. Joseph, in his capacity as a bankruptcy trustee, appeals from the court's August 15, 2007 order granting the Probate Code¹ section 850 petition of Lilly M. Cheseborough, as trustee of the trust (the Trust) created under the Robert Cheseborough and Lillie Cheseborough Revocable Living Trust Agreement dated February 28, 1996 (the Trust Agreement). Joseph argues the Trust "was revoked as to certain assets" and that real property was transferred out of the Trust. We disagree and affirm.

FACTS

In 1996, Robert Cheseborough and Lillie Cheseborough, created the Trust and funded it with their Long Beach house, "various annuities," and a car. The Trust Agreement provided that if one spouse died and was survived by the other, the trust estate was to "be divided into two equal shares": (1) Share A, over which the surviving spouse had "absolute control," and (2) Share B, the marital deduction trust. In addition, the Trust Agreement provided that, after the deaths of both spouses, (1) the Trust's estate, "after giving effect to . . . 'Special Directives,'" was to be distributed in equal shares to Linda Young and Lilly M. Cheseborough as beneficiaries, and (2) Lilly M. Cheseborough (Successor Trustee) was to "serve as First Successor Trustee."

On September 9, 2000, Lillie Cheseborough died. Robert Cheseborough (Robert)² "thereafter failed to make [the] requisite division of Trust Assets into 'Trust A' and 'Trust B.'" Around September of 2003, Robert "met Sally Kanarek and they began to date thereafter." In February 2004, Robert signed a Grant Deed transferring title to the Long Beach house from the Trust to himself individually as "an unmarried man." He then encumbered the Long Beach house with a \$230,000 deed of trust. In March 2004,

¹ All statutory references are to the Probate Code unless otherwise stated.

² We use decedent's first name for clarity. We intend no disrespect.

Robert bought a house in San Clemente, “taking out a loan of \$555,000.” Kanarek, who had filed for bankruptcy in February 2004, moved in with Robert.

Around April 5, 2004, Robert “signed a document purporting to be a holographic will” (the holographic will). The holographic will was hand printed and read: “4-5-04 Monday [¶] I Robert Cheseborough want Sally Kanarek to be the sole heir and be executor of my estate, which includes my Long Beach house, my house in San Clemente and my annuitys [*sic*] at American annuity [*sic*] (American Equity) and Americo. She will have my power of Attorney and will be a signor on my bank account at Bank of America. I leave nothing to my children & grandchildren. I feel that what I [have] done for them is enough & my objective is to make my life happy and my wife to be secure & happy for life.” Robert signed and dated the holographic will.

Robert died on May 4, 2004. Kanarek petitioned for probate of the holographic will. Successor Trustee contested the holographic will on grounds it was not entirely in Robert’s handwriting, it resulted from Kanarek’s undue influence over Robert, and Robert lacked testamentary and mental capacity. Successor Trustee petitioned for probate of Robert’s will dated February 28, 1996, which appointed her as his successor executor in the event Lillie Cheseborough predeceased him.

In January 2005, the trustee for Kanarek’s bankruptcy estate moved to intervene in the case. The court granted the motion. In June 2005, Joseph (Bankruptcy Trustee) was named successor bankruptcy trustee of Kanarek’s bankruptcy estate.

On May 10, 2008, Successor Trustee petitioned under sections 855 and 850, subdivisions (a)(2)(A), (B), (C) and (3)(A) and (C) for an order determining ownership and directing conveyance and surrender of properties against Robert’s estate and Kanarek. By order filed August 15, 2007, the court found Kanarek had no standing in the probate estate and therefore lacked personal standing to oppose Successor

Trustee's petition.³ All real property and the proceeds thereof, and all personal property (other than a certain life insurance policy), that were "the subjects of this Petition, regardless of whether title thereto was held in the name of the decedent individually or as Trustee of the Trust," were "assets of the Trust and not assets of the probate estate" The Trust, Trust A and Trust B became irrevocable on September 9, 2000, upon the death of Lillie Cheseborough. Robert "did not otherwise revoke 'Trust A' prior to his death" The holographic will did not revoke the Trust or Trust A and was not a "'Special Directive'" to the Trust and did not give any interest in the Trust or any property to Kanarek. Kanarek and Bankruptcy Trustee had no interest in the Trust, Trust A, or Trust B. Successor Trustee was "entitled to receive title to and possession of all of the real property or the proceeds thereof, all cash and deposits, and all of the personal property that are the subjects of this Petition, with the exception of the proceeds from" the specified life insurance policy. The court ordered the Public Administrator to deliver cash, furnishings and items of personal property to Successor Trustee.

DISCUSSION

Bankruptcy Trustee argues the "court erred when it determined that the Trust became irrevocable on the death of" Lillie Cheseborough. He relies on section 15400, which states: "Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor." He avers that "[n]owhere in the Trust document does the Trust recite that all, or any portion of the Trust, other than 'designation of beneficiaries of specific gifts' is to be irrevocable." Relying on

³ Because the court ruled that Kanarek lacks standing in the probate case, the Bankruptcy Trustee (who claims the court's August 15, 2007 order invalidated Robert's bequests to Kanarek) is an aggrieved party and has standing to appeal. (Code Civ. Proc., § 902.) We thus deny Successor Trustee's motion to dismiss this appeal for lack of standing.

Gardenhire v. Superior Court (2005) 127 Cal.App.4th 882, he asserts “a Settlor may revoke a Trust by his will unless precluded by the language of the Trust.” He contends the holographic will “clearly evidences an intention by the Decedent that the listed assets not be part of his Trust, but, rather be distributed to Sally Kanarek.” He also argues the holographic will can alternatively be considered an amendment to the Trust, as opposed to a will. He further points out that upon Robert’s death, title to the Long Beach and San Clemente houses, along with certain “cash assets,” were in his name only. He asserts “[h]is act of conveying the [Long Beach house] to himself amounted to a revocation of the Trust as to that real property.” Finally, he argues Robert had “a General Power of Appointment of Trust Assets.”

Successor Trustee replies the “terms of the Trust limit and qualify the allowed method of revocation, expressly providing that revocation of the Trust had to be made in writing during” the spouses’ joint lives. Successor Trustee concludes the court properly found “the Trust, and both Trust ‘A’ and Trust ‘B’, became irrevocable on [Lillie Cheseborough’s] date of death” She argues that, despite Robert’s transfer of real property to himself, he “had no right to remove property from the Trust”; therefore, “any attempt by [Robert] to revoke the Trust after [Lillie Cheseborough’s] death is void and has no effect on the Trust assets.”

In evaluating these conflicting views, we interpret the Trust Agreement *de novo* since no extrinsic evidence was presented in this case. (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57.) We apply general principles of contract interpretation. “The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.” (Civ. Code § 1638.) “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible.” (Civ. Code § 1639.) “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (Civ. Code § 1641.) “A contract must receive such an interpretation as will make

it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.” (Civ. Code § 1643.) “The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.” (Civ. Code § 1644.)

We turn to the language of the Trust Agreement, which contained the following pertinent provisions:

“Section 1.08. Amendment and Revocation [¶] At any time during the joint lives of the Trustors, jointly as to community property and individually as to separate property, the Trustors may, by a duly executed instrument filed with the Trustee: [¶] a) Amend this Trust Agreement in any manner; and/or [¶] b) Revoke this Trust Agreement in part or in whole. If the Trust Agreement is revoked in whole, the Trustee shall transfer title to all Trust property of every kind and description back into the individual names of the Trustors. The instrument of amendment or revocation shall be effective immediately upon its proper execution by the Trustors, but until a copy has been received by a Trustee, that Trustee shall not incur any liability or responsibility either (i) for failing to act in accordance with such instrument or (ii) for acting in accordance with the provisions of this Trust Agreement without regard to such instrument. [¶] c) Withdraw from the Trust Estate all or any part of the principal and accumulated income of the Trust to Satisfy liabilities lawfully incurred in the administration of this Trust.”

“Section 1.09. Revocation or Alteration by Trustor Alone [¶] The rights of revocation, withdrawal, alteration and amendment reserved in this Article must be exercised by the Trustor, and may not be exercised by any other person, including an agent, a guardian or a conservator.”

“Section 1.10. Irrevocability [¶] Except as otherwise provided, on the death of either Trustor, the designation of Beneficiaries of specific gifts in this Trust shall become irrevocable, and not subject to amendment or modification.”

“Section 3.03. Division into Shares [¶] Upon the death of either Trustor, if the deceased Trustor is survived by the other Grantor, the trust estate . . . shall be divided into two equal shares. [¶] . . . [¶] The first such share (‘Share A’) shall be paid or distributed, or held in further trust, as the surviving Trustor from time to time may direct. It is the intention of the Trustors that the surviving Trustor shall have absolute control over the disposition of Share A. [¶] The second share (‘Share B’) shall be held as hereafter provided in this Agreement.”

“Section 3.04. Marital Deduction Trust [¶] [T]he Trustee . . . shall pay the net income [from Share B] to or for the benefit of the surviving Trustor [¶] . . . The surviving Trustor shall have the right to demand and receive from the principal of [Share B] in each of its fiscal years the greater of \$5,000 or five percent of the fair market value of such principal”⁴

In *Heaps v. Heaps* (2004) 124 Cal.App.4th 286 (*Heaps*), we interpreted a trust provision that was virtually identical to section 1.08 of the Trust Agreement here. (*Id.* at p. 290.) We concluded there was “no question” the *Heaps* trust became irrevocable upon the first spouse’s death. (*Id.* at p. 289.) The pertinent provision in

⁴ A “Notarized Summary of Trust” provides in paragraph 3: “Upon the death of either Trustor, the surviving spouse retains the unlimited right to the Trust. She or he also retains a general power of appointment which can be exercised by will or by lifetime transfer over the Trust property.” In paragraph 12, the summary states: “The use of this Summary of Trust is for convenience only and the Trust solely controls as to provisions and interpretations, and any conflict between this abstract and the Trust shall be decided in favor of the Trust.” The Bankruptcy Trustee argues this summary of the trust serves as “a helpful guide to interpretation of the terms of the Trust.” Not so. First, we find no general power of appointment in the Trust Agreement, and Bankruptcy Trustee does not cite any such provision. Second, the summary states on its face that the language of the Trust Agreement is the sole determinant of any conflict.

Heaps stated: “‘Section 1.06 Amendment and Revocation [¶] ‘At any time during the joint lives of the Trustors, jointly as to Community Property and individually as to his or her own separate property, Trustors may, by a duly executed instrument,’ [¶] ‘a) Amend this trust agreement (including its technical provisions) in any manner and/or’ [¶] ‘b) Revoke this trust agreement in part or in whole, in which latter event any and all trust properties shall forthwith revert to such Trustor free of trust. Such instrument of amendment or revocation shall be effective immediately upon its proper execution by Trustor(s), but until a copy has been received by a trustee, that Trustee shall not incur any liability or responsibility either (i) for failing to act in accordance with such instrument or (ii) for acting in accordance with the provisions of this trust agreement without regard to such instrument.’” (*Id.* at p. 290, italics omitted.)

Our view has not changed. Based on the clear and explicit language of section 1.08 of the Trust Agreement, the Trust became irrevocable upon Lillie Cheseborough’s death.⁵

Bankruptcy Trustee tries to distinguish *Heaps* on the basis that *Heaps* involved a “land mine” paragraph. That paragraph provided: “‘Section 5.06 Manner of Holding Title’ [¶] ‘The Trustee may hold securities or other property held by Trustee in trust pursuant to this Declaration in Trustee’s name as Trustee under this Declaration, *in Trustee’s own name without a designation showing it to be Trustee under this Declaration*, in the name of Trustee’s nominee, or the Trustee may hold such securities unregistered in such condition that ownership will pay by delivery.’” (*Heaps, supra*, 124 Cal.App.4th at p. 290.) But *Heaps*’s section 5.06 was only pertinent because the spouses there sold a home during their joint lives and “got back a note and an all-inclusive deed

⁵ In addition, under section 1.08, the Trust Agreement could not be amended after the death of Lillie Cheseborough. Therefore, we need not address Bankruptcy Trustee’s argument that under *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, the holographic document simultaneously represented “an amendment to his trust and a holographic will as to his non-trust assets.”

of trust . . . *title to which was taken as joint tenants.*” (*Id.* at p. 289.) Thus, we stated the “question on which this case turns is . . . whether the proceeds from the sale of the [home] were still *in* the trust as of” the first death of a spouse. (*Ibid.*) We concluded that section 5.06, by “saying that title to trust property could be held in *any* way, . . . necessarily meant that selling an asset and taking title in a name other than that of the trust’s would not, by itself, take the property out of the trust.” (*Id.* at p. 291.) Because we “determined that the placement of assets within the trust became irrevocable with [the first spouse’s death]” (*id.* at p. 291), we concluded the subsequent attempts by the surviving spouse and/or his second wife to “place those assets in [another] trust . . . , constituted conversion of the assets of the original trust.” (*Id.* at p. 292.)

Here, there is no question the Trust assets were still in the Trust upon Lillie Cheseborough’s death. Robert’s transfer of the Long Beach house to himself did not occur until after the death of Lillie Cheseborough.

Sections 1.09 and 1.10 of the Trust Agreement do not change our conclusion. Section 1.09 states that any right to revocation may be exercised only by a trustor; the section does not create any revocation right. Section 1.10 states that gifts to designated beneficiaries are irrevocable after the first spouse’s death; the section is consistent with section 1.08 and not superfluous as it would apply to additional special directives gifting Trust property.

But Bankruptcy Trustee argues the court found the Trust irrevocable upon Lillie Cheseborough’s death only by implication, and not by the express language of the Trust as required by section 15400. He attempts to bolster his argument by noting that although the Trust Agreement specifies in section 1.08 a method for revocation during the spouses’ joint lives, it is “silent as to how revocation is to be accomplished” after the death of a spouse. Under these circumstances, he argues section 15401, subdivision (a)(2) “must be applied.” That statute states: “A trust that is revocable by the settlor may be revoked in whole or in part by any of the following methods”; “(2) By a writing (other

than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor.” Based on this section’s provision of a method of revocation, and the absence of a method of revocation after Lillie Cheseborough’s death, he concludes “the absence of a provision [in the Trust Agreement] setting forth the method of revocation or amendment cannot be held to imply that a trust is irrevocable.”

This argument is unpersuasive. Section 15401, subdivision (a)(2) applies only to a revocable trust. Here, the Trust was “expressly made irrevocable” by section 1.08 in accordance with section 15400.

Finally, Bankruptcy Trustee argues that even if Robert did not revoke the Trust, he properly distributed an asset (the Long Beach house) out of the Trust. Bankruptcy Trustee relies on section 3.03 of the Trust Agreement, by the terms of which the trustee was empowered to distribute the assets of Trust A. Under section 3.03, the “surviving Trustor shall have absolute control over the disposition of Share A.” Bankruptcy Trustee emphasizes the grant deed (conveying title from Robert as trustee to Robert individually) specifically states: “This conveyance transfers the grantor’s interest out of his . . . revocable living trust.” Thus, Bankruptcy Trustee concludes, the transfer of the Long Beach house was a proper exercise of Robert’s “absolute control over the assets of Trust ‘A.’” The defect in this argument, of course, is that the Long Beach house was never an asset of Trust A and therefore Robert had no power under section 3.03 to effect a distribution of that asset. As acknowledged in Bankruptcy Trustee’s opening brief, it “is undisputed that the Trust A and Trust B were never funded or created.” “A trust is created only if there is trust property” (§ 15202); because no property was ever allocated to Trust A, that trust never existed. Moreover, in October 2003, Robert executed three special directives concerning the house. One directed his “home to be sold at fair market value, with net proceeds split 50/50 between listed heirs.” Another directed “either heir to have the right of first refusal to purchase [his] home.” The third directed that, if “either heir purchase[s] this home 50/% of net proceeds from purchase will be in other

heir[']s bank account . . . prior to possision [*sic*] or occupation.” Thus, even assuming the Long Beach residence could have otherwise been distributed at Robert’s direction, his prior special directives created irrevocable gifts under section 1.10 of the Trust Agreement.

DISPOSITION

The judgment is affirmed. Lilly Cheseborough shall recover her costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.